IN THE HIGH COURT OFJUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 88 OF 2001
WITH CROSS OBJECTION (ST) NO.6644 of 2001
Shri Chotubhai Kasham Khoja .. Appellant

vs

Shri Badruddin Hasham Khoja. Respondent

Mr.Pramod Pawar for Appellant

Mr.R.M.Agarwal for Respondent nos. 1 to 4.

CORAM : D.G.DESHPANDE AND
SMT ROSHAN .S.DALVI, JJ
DATE: 15th December, 2006

JUDGMENT (Per Smt.R.S.Dalvi,)

1. This appeal is in respect of a family dispute relating to the self-acquired properties left initially by the deceased father of the parties and later by their mother under their testamentary dispositions.

2. The parties are khoja muslims. They belong to Shia sect. The parties are brothers and sister. The parties also had various businesses. They initially carried on business in partnership. Thereafter, the

appellant (Original defendant no. 1) separated from the family partnership businesses upon dissolution of the partnership firm on and from 16th November, 1976. He was given one of the family businesses to run singly and independently of the other brothers. The other brothers carried on other family business in partnership. Their sister has been married and settled abroad.

3. The appellant was allowed to live in a part of one of the properties of the firm. That was the first floor in H.No.23 of Karad Municipality which is one of the suit properties.

4. The Dissolution Deed provides that on payment of Rs.51,000/- by the respondents (original plaintiffs in suit) to the appellant, they would be entitled to recover from him the premises in which he resided. It is only in this respect that the parties rights with regard to the immovable properties and their

respective businesses came to be considered together. The suit or this appeal is not otherwise concerned with the partnership businesses.

5. The relationship of the parties and the properties left by their parents are admitted.

6.. The suit was filed for a declaration of the title of the respondents, for possession of the property in which the appellant resided, for permanent injunction and for mesne profits for illegal occupation thereof.

7. Respondents 1 to 4 claim title on the basis of the bequest made to them under their mother's will. This is the only dispute between the parties. In her will, the mother has left all the properties to her four sons who are respondent nos. 1 to 4 in this appeal. The appellant and respondent no. 5 are disinherited. The respondent no. 5 has accepted her position and has not challenged the will.

8. The main contention on behalf the appellant that the will is void and illegal as the testatrix, who was a khoja muslim, has sought to dispose of the entire of the properties owned and possessed by her. It is contended on behalf of the appellant that, being a muslim, she had no disposing power for making a testamentary disposition of the entire of her properties without the consent of all her heirs as per the fundamental tenet of muslim law relating to inheritence amongst muslims.

9. To show the law by which the testatrix, the mother of the parties was governed, the appellant has relied upon the will left by his father which is not disputed. In his will, the father has bequethed all his self-acquired properties to his wife after obtaining the consent of his sons. It is contended on behalf of the appellants that that single act shows that the father of the parties was governed by Muslim law. Once he was so governed, his heirs and legal representative being

his wife, is also necessarily governed only by Muslim law and hence the bequest made by her to some of her heirs without the consent of the other heirs of the entire of her properties is void.

10. It may be mentioned that the law governing the parties is to be seen and applied not upon a single act of any party. It is governed by the personal law governing those parties as a whole.

11. It is contended on behalf of the respondents that the personal law relating to khoja muslims by custom is Hindu law. The parties being governed by Hindu law has a disposing power for making a testamentary disposition with regard to their entire of their properties without any consent of any of their heirs.

12. It may be mentioned that it is now settled law that the personal law applicable to khoja muslims is

Hindu law. Nevertheless, since this basic and fundamental concept is disputed, the law relating to the parties and the precedents would be required to enunciated. The dispute between the parties can be adjudicated upon this fundamental premise alone. We, therefore propose to consider this aspect alone for the disposal of the appeal.

13. The respondents have relied upon and drawn our attention to the Constitution of the Shia Imami Muslims established by their spiritual leader Aga khan and by which the personal law of the parties is governed. They have also relied upon and drawn our attention, to the Rules and Regulations of the Shia Imami Muslims in India also established by their spiritual leader, Aga Khan. The applicability of the rules and regulations under the Constitution is set out in Article 2 thus:

“ 2. **Applicability**

2.1: These rules and regulations shall come into force on 13th December, 1987.

2.2: These rules and regulations shall apply to the jamats in India subject only to the overriding affect of any applicable laws of India to the extent of any inconsistency.

(Emphasis supplied)

14. The law in India relating to Khoja muslims will therefore, have to be seen. The principles of Mohammedan Law by Mulla edited by Justice M.Hidaytullah in 17th Edition in section 22, relate to the law relating to khojas, and kachhi memons.

15. Section 22 lays down that in the absence of proof of several usages to the contrary, khoja and kutchi memons in Bombay State (which is now Gujarat and Maharashtra) was governed for matters of succession and inheritance not by Mohammedan Law but by Hindu law. **(Bracket Supplied)**

16. After the enactment of Shariat Act, 1937, Hindu Law of inheritance and succession continued to

apply to khojas and kutchi memons on the ground of custom. The commentary of Mulla in the aforesaid paragraph shows that this custom was so well established among them that if any member of either of these communities set up a usage of succession opposed to the Hindu law, such a burden lay upon them to prove such usage.

17. Section 24 in the aforesaid supra relates to testamentary power of khojas. It sets out that a khoja may dispose of the whole of his properties by a will.

18. The legal position that prevailed upon the enactment of the Shariat Act, 1937 must therefore, be considered.

19. Section 2 of the said Act abrogates any custom and usage which is contrary to Mohammedan Law in matters enumerated in that section. Matters enumerated are with regard to intestate succession,female properties, marriage, its dissolution,

maintenance, dowry, guardianship, gifts, trusts and trust properties and wakfs. Its applicability to testamentary succession is conspicuously absent.

20. Upon considering the aforesaid section of the Shariat Act **i**n case of **ASHARAFALLI CASSAMALLI VS MAHOMEDALLI RAJABALLI** reported in Volume 1945 48 BLR 642 at page 647, Justice Chagla (as he then was) has held that even after the enactment of the said Act, customary law would prevail in respect of testate succession since section 2 of the Act enumerates only intestate, as opposed to, testate succession. Consequently, the law laid down even by precedents is that a will made by a khoja must be construed according to Hindu Law. Justice Chagla considered the enumeration of the matters in chapter 2 of the Shariat Act. Since the testamentary succession has not been enumerated under section 2 it has been held that the custom which prevailed before the said Act came into force continued to apply. It has been held that :

" The deceased was a khoja Mahomedan and it has now been established by a series of authorities of this Court that in matters of succession and inheritance a khoja was governed by Hindu law on the ground of custom. It is unnecessary to review all the authorities that establish this proposition..... "

21. It has further been held in the judgment :

" It is indisputable that courts must construe the will of a khoja according to Hindu Law. "

22. This entire appeal is based upon this seminal premise.

23. Mr.Pawar, the ld.Advocate of the appellant strenuously argued that because the father of the parties had made his will bequeathing his properties to his wife with the consent of the sons, he had impliedly accepted Mohammedan law of inherintance and succession relating also to testamentary succession. This constituted a declaration made under the Shariat Act. Hence, thereafter, the parties came to be governed by Mohammedan Law Even this argument is incorrect. The declaration which is required to be made

under Shariat Act is in a prescribed form. It is for the appellant to produce and prove the declaration, if any, made. The appellant has failed to do so. The customary law therefore, continues to apply. As stated in the aforesaid commentary supra, it is for the appellant to dislodge the custom. The appellant has sought to dislodge only on the basis of his father's will. That single act cannot dislodge a well-settled custom.

24. The mother of the parties had disposable power to bequeath the property. She bequeathed as per her custom. Her will is not required to be probated under the Indian Succession Act. Her will is therefore, valid.

25. The Advocate for the appellant has also contended that the will was obtained by fraud and was executed when the testatrix was not in a fit position and mental condition. That aspect has to be proved by the appellant. No evidence is led in that regard.

26. The appellant has relied upon the city survey records showing all the parties as joint owners of the property which was not challenged by the Respondents. The mere factum of the entries in the city survey records cannot confer title. The respondent nos. 1 to 4 claim title through inheritance by testamentary succession through their mother. The records would have to be corrected accordingly.

27. Feeble attempts have been made to discredit the will on the ground that it is not registered and that it is attested by persons outside their community and that the signature has not been proved by the handwriting expert or that the witnesses who proved the will were not independent witnesses. None of these contentions take the case of the appellant any further.

28. The appellant has sought to contend that under the Deed of Dissolution dissolving the

partnership businesses the parties had agreed to pay the appellant Rs.51,000/- for recovery of possession of the premises in his possession and disregarding that aspect his mother, has bequeathed the properties to the respondent nos.1 to 4 and hence, the bequest failed. His mother is not expected to know or abide the terms of another contract between partners of a business. All that is required is that she had title to the properties, she sought to bequeath. The failure, if any, of the bequest under the will would then be to the extent of Rs.51,000/- . The respondent nos. 1 to 4 have, without prejudice to their rights and contentions, offered Rs.51,000/- to the appellant to recover the possession of the premises from him. We do not see how all the bequests under a will can fail if the family members who once carried on partnership businesses together had covenanted to secure the appellant to a reasonable extent for the premises in his possession. That security only relates to the possession of the premises and cannot confer title upon the appellant.

29. The cross appeal filed by the respondent nos. 1 to 4 is in respect of the payment of Court fees in the original suit. The original suit was filed by the respondent nos. 1 to 4 for recovery of the possession of the premises in which the appellant resides and for a declaration of their ownership with regard to all the properties left by the deceased. The respondent nos.1 to 4 as the plaintiff in that suit have valued these properties at Rs.25,000/- with regard to their claim of ownership thereof. They have paid the Court fee of Rs.1720/- thereon. The learned trial Judge has considered the market value of the properties which was to the extent of Rs.46 lacs as per the valuation of the government Valuer. In fact, he has taken a conservative estimate for the suit properties at the valuation of Rs.35 lacs observing that even if the government valuation is an exaggeration, the market value of the properties would be at least Rs.35 lacs since they are admittedly in prime locality of the city.

Consequently, the learned Judge has directed the plaintiff to properly value the suit and pay the ad valorem Court fees as required subject to the maximum valuation under the Court Fees Act. It is upon this condition that the suit has been disposed of on merits in favour of the respondent nos. 1 to 4.

30. We may mention that in fact the learned trial Judge could have rejected the plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure on account of inadequate valuation. The learned trial Judge instead has considered the case of the respondent nos. 1 to 4 on merits and answered issue No. 10 holding in that the suit is not correctly valued and has ordered deficit court fee to be paid as a condition for execution of the decree and ordered it to be recovered by the government as arrears of land revenue. We find that not only is the reasoning of the learned trial Judge correct but, also benign. As a result, the learned trial Judge has considered all the

issues including the issue of deficit court fee correctly.

31. In view of the above, both the appeals fail and are dismissed.

32. With regard to First Appeal No.88 of 2001 we may mention that there are Regional Boards for Alternative Dispute Resolution (ADR) in case of family matters relating to Khojas established under the Constitution/Rules and Regulations governing Khojas. They render yeomen service to members of Khoja community. We are surprised that despite such intra community infrastructure for settlement of disputes, the appellant has not resorted to that process. Though the appeal is dismissed and the consequences would follow, it would be open to the appellant to forthwith adopt the procedure for an amicable settlement by appearing before the Regional Boards of his community to amicably resolve the dispute relating to possession of his premises.

33. With regard to Cross Objection (St) No.6644 of 2001 the respondent nos. 1 to 4 shall pay the deficit Court fee as shall be computed by the Registrar/Nazir of the trial Court after which the execution of the trial Court decree shall proceed.

(Smt Roshan Dalvi, J) **(D.G.Deshpande,J)**